called many men at the plant "girl scouts" this was insufficient evidence of sex stereotyping).

As noted above, Petitioner's reliance on Judge Posner's concurrence in *Weyauwega* is particularly unavailing. Judge Posner agreed that, under the current state of the law and this Court's decisions, evidence of sex stereotyping could support a claim for sex discrimination. Indeed, he acknowledged that the "logic" of *Price Waterhouse* is that if an employer disapproves of conduct by a man that it would not disapprove of in a woman, or conduct by a woman that it would not disapprove of in a man, the disapproval is "because of sex." *Id.* at 1067. This is exactly the proof Barnes submitted to the jury – that a high-ranking supervisor criticized him for not being masculine enough because he wore make-up, nail polish, and lipstick – all things women police officers were permitted to wear. Judge Posner's disagreement with the logic of this Court's opinions is not a valid basis for review by this Court of the lower courts' view that Barnes's evidence sufficed to make out a Title VII claim.

Various courts of appeals have followed *Price Waterhouse* and found sufficient evidence of sex stereotyping to support a sex discrimination claim. *See Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107 (2d Cir. 2004) (evidence of employer's stereotypical remarks that a mother of young children should not work was a form of gender discrimination); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (if "the harasser was acting to punish the victim's noncompliance with gender stereotypes," then there was liability); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 870 (9th Cir. 2001) (male co-workers accused the plaintiff of carrying his serving tray "like a woman"); *EEOC v. Joe's*

Stone Crab, Inc., 220 F. 3d 1263, 1284 (11th Cir. 2000) (deliberate and systemic exclusion of women food servers based on a sexual stereotype that "fine dining" was associated with male servers); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (relying on *Price Waterhouse* in non-employment case, holding that cross-dressing male loan applicant may prove claim under Equal Credit Opportunity Act that loan was denied because of sex if he can prove stereotyping caused the loan officer to send him home to change out of his dress); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 865 (8th Cir. 1999) (plaintiff properly stated a claim under Title VII where he alleged that the complaint was based in part on rumors that circulated labeling the plaintiff as homosexual in an attempt to "debase his masculinity"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (dismissing improperly pleaded claim that did not argue gender stereotype motivation, but leaving the door open to a Title VII cause of action for harassment based on sex stereotyping); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997) (evidence that co-worker harassment was motivated by gender role stereotypes established that the harassment was because of sex), *vacated and remanded on other grounds for further consideration in light of Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) at 523 U.S. 1001 (1998); *Haynes v. W.C. Caye & Co.*, 52 F.3d 928 (11th Cir. 1995) (holding that remarks to women that they were too nice and not tough enough to handle debt collection violated Title VII).

No circuit has stated that it has any disagreement with *Price Waterhouse* or inability to follow it. The clear trend in the circuits is to follow *Price Waterhouse* and recognize that a Title VII claim for sex discrimination is

actionable when there is evidence of gender stereotyping. The Sixth Circuit's decision is fully consistent with that trend, and not in conflict with *Price Waterhouse* or any appellate decision since *Price Waterhouse*. Therefore, there is no conflict that requires this Court's attention.

II. THERE IS NO DISAGREEMENT AMONG THE COURTS THAT A TRANSSEXUAL MAY BRING A CLAIM FOR SEX DISCRIMINATION

In its second argument, the City contends that transsexuals do not have standing to bring a Title VII claim. This Court should reject this argument, as did the lower courts. Barnes may have been a transsexual, but he was also a male when the City discriminated against him. As a male, he has standing to bring a Title VII claim. Pet. App. 9-10, 13-14. The City cites no cases to support its argument, let alone a conflict among the circuits.

III. REVERSAL OF THE SIXTH CIRCUIT'S TITLE VII HOLDING WOULD NOT DISPOSE OF THIS CASE BECAUSE THERE IS AN ALTERNATIVE GROUND TO SUPPORT THE JUDGMENT

The jury found Barnes proved both his Title VII disparate treatment claim and his Equal Protection Clause discrimination claim. Pet. App. 79-80. Although the City appealed the equal protection jury instructions, the Sixth Circuit declined to review the equal protection issue, stating that "[a]s the City conceded at oral argument, however, we need not reach these challenges if we uphold the Title VII verdict. As a result, we will not address these arguments." Pet. App. 18. Even if this Court were to reverse the Sixth Circuit's affirmance of the district court's

Title VII judgment, the jury verdict for Barnes could be affirmed on alternative grounds under the Equal Protection Clause claim. For this reason as well, *certiorari* should be denied.

IV. THE REMAINING GROUNDS ARGUED BY THE CITY DO NOT IMPLICATE IMPORTANT FEDERAL QUESTIONS OR OTHERWISE PROVIDE A REASON FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWERS

Petitioner makes three additional arguments that are fact-bound and involve well settled principles of law: It asserts that the mixed motive jury instruction was erroneous (Pet. 12); that the Sixth Circuit did not follow Sixth Circuit case law regarding similarly situated employee proof (Pet. 15); and that the district court abused its discretion in awarding attorney fees (Pet. 16). None of these issues raise an important federal question.

The City argues that the jury should have been instructed on pretext and not mixed motive. The lower courts thought otherwise, and the City itself submitted a mixed motive instruction at trial. Whether the evidence supported such an instruction on the unique facts of this case is precisely the sort of fact-specific question that this Court regularly declines to grant certiorari to address. In any event, this Court's precedent amply supports a mixed motive instruction in this case. A plaintiff is entitled to some relief under Title VII once he establishes that sex was "a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §2000e-2(m). A mixed motive case is one in which both legitimate and illegitimate (discriminatory) reasons combine to explain the adverse employment action. *Desert*

Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003). If the jury determines that sex discrimination was "a motivating factor" in the decision, the employers may nonetheless avoid paying damages if the employer establishes that the same adverse employment decision would have been made in the absence of the illegal sex discrimination. 42 U.S.C. §2000e-5(g)(2)(B).

The court properly instructed the jury in accordance with *Desert Palace*. Pet. App. 15-17. The City did not object at trial and even submitted its own mixed motive jury instruction which stated: "However, if you find that unlawful discrimination was a motivating factor in the City's employment decisions toward Plaintiff, you must return a verdict for Plaintiff." R. 59, p. 15, Apx. 145; Tr. 1163-1164, Apx. 665-666.[6] The City's proposed instruction was substantially similar to the one the court gave:

> Plaintiff must prove that her failure to conform to sex stereotypes was a motivating factor in Defendant's decision to demote Plaintiff. . . . Plaintiff's failure to conform to sex stereotypes was a "motivating factor" if it played a part in Defendant's decision to demote Plaintiff.

Tr. 1274, Apx. 700. Furthermore, the City did not object to the proposed instruction, stating:

> . . . frankly, I thought the wording was okay. . . . I only had a change that Plaintiff must prove that his sex was a motivating factor. . . . The rest I believe is accurate.

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[6] Reference to Apx. is to the joint appendix filed in the Sixth Circuit.

Tr. 1132-1133, Apx. 645-646; Tr. 1166, Apx. 668. When a party fails to object to a mixed motive instruction the issue is waived on appeal. *See Libbey-Owens-Ford Co. v. Insurance Co. of N. Am.*, 9 F.3d 422, 427 (6th Cir. 1993).

Next, the City argues the Sixth Circuit did not require, as part of the *prima facie* case, that Barnes prove he was treated differently than a similarly situated employee outside his protected class. Again, whether the evidence here made out a *prima facie* case is a quintessentially fact-bound issue. Moreover, as the Sixth Circuit properly held (and as this Court has repeatedly emphasized) evidence of a *prima facie* case is not the proper subject of an appeal once a case has gone to the jury. It is well settled law that the ultimate question is whether discrimination was shown by a preponderance of evidence, not whether the elements of a *prima facie* case have been met. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 n.3 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981). The Sixth Circuit followed its own precedent from *EEOC v. Avery Dennison Corp.*, 104 F.3d 858 (6th Cir. 1997) which stated:

> Not only should a district court decline to rule in that manner, we should not review the case for whether a *prima facie* case had been made, but rather, whether the ultimate issue of discriminatory retaliation falls in the favor of the Plaintiffs or Defendant.

Id. at 862. Therefore, whether Barnes made out a *prima facie* case is an irrelevant consideration at this stage.[6]

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[6] In any event, Barnes's evidence was more than sufficient to show, by comparison with the treatment of other employees (both male and

(Continued on following page)

Finally, the City argues that the Sixth Circuit "abused its discretion" in upholding Barnes's attorney fee award. The City makes no effort to identify any error in the Sixth Circuit's statement of the law governing attorney fees, and the claim of an abuse of discretion or similar "misapplication of a properly stated rule of law" is exactly the type of claim of error that this Court's Rules state is generally *not* a proper basis for a petition for certiorari. S. Ct. R. 10. In any event, the Sixth Circuit's opinion makes clear that the lower courts properly followed *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989), which endorsed the 12 factors to be considered in assessing the reasonableness of an award of attorney's fees as set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The 12 factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of

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female) that he was discriminated against because he was viewed as lacking sufficient male characteristics to be a sergeant – a standard obviously not applied by the City to women. As the Sixth Circuit stated: "Barnes presented evidence he was the only police sergeant to fail probation between 1993 and 2000 and that the one other sergeant, who had lower probationary scores than Barnes was not a member of Barnes's protected class, passed probation." Pet. App. 10-11.

the professional relationship with the client; and (12) awards in similar cases.

Blanchard at 91 n.5. The Sixth Circuit's decision weighing each of these factors in this case is not in conflict with *Blanchard*, nor does it raise any important federal question.

CONCLUSION

For all the foregoing reasons, this case is not worthy of this Court's review and the Petition should be denied.

Dated: October 5, 2005

Respectfully submitted,

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EXHIBIT C

12.020 UNIFORMS, RELATED EQUIPMENT, AND PERSONAL GROOMING

Reference:

Standards Manual 1.3.9, 17.5.2, 22.2.7, 26.1.1, 26.1.3, 41.3.5, 41.3.6, 52.1.7, 53.1.1, 53.2.1, 61.3.2

Policy:

Sworn personnel will only wear uniforms and equipment issued or approved by the division.

Sworn personnel will maintain in good repair and have available a full police uniform and related equipment.

Uniformed personnel assigned to patrol duties will carry the PR-24 at all times.

Division personnel, whether on or off duty, will wear their badge or division issued ID (identification) card while in a police facility.

Division employees, on-duty, will be properly groomed and dressed, including authorized firearm, badge, and ID card. Division employees will wear either the uniform of the day (for their respective unit) or acceptable business attire of conservative color and design.

Procedure:

A. Calendar for the Uniform of the Day:

1. On May 16, uniformed personnel will begin wearing the summer cap, short sleeve shirt, and necktie.

a. Specialists/police officers whose primary function is to perform field duties, including all specialists/police officers assigned to a uniformed shift, are exempt from wearing the necktie.

2] Submit a renewal request every three months or for each recurrence.

3] Officers with an extensive, documented medical history of treatment for pseudofolliculitis barbae may submit requests for 12 month exemptions.

2. Grooming standards for female police officers:

a. Hair:

1) The hair, when worn full length, will not extend downward below the lower edge of the shirt collar.

2) Longer hair may be worn, but must be uplifted to the top of the head while in uniform. When in the uplifted position, no hair will extend downward below the lower edge of the shirt collar.

3) The length of the hair will not interfere with the proper wearing of the uniform cap.

4) Frontal grooming will not permit the hair to be visible on the forehead when the uniform cap is worn.

b. Makeup:

1) A moderate use of makeup is permissible.

a) The use of eye shadow is prohibited. The heavy use of makeup is not acceptable.

2) Fingernail polish, other than clear or neutral shades, is prohibited.

3. Jewelry:

a. The wearing of jewelry by male and female officers (chains, necklaces, pendants, earrings, bracelets, etc.) will be limited to rings and watches while in uniform.

1) Religious medals, scapulars, and other bona fide expressions of religious affiliations may be worn around the neck, provided the item is concealed by either the uniform shirt or an undershirt.

4. The above regulations apply to all uniformed and nonuniformed officers. Exceptions are officers who, because of the nature of their assignments, have the written permission of their bureau commander exempting them from these regulations.

a. The bureau commander will maintain a record of this exemption.

K. Identification of Civilian Employees:

1. Unit supervisors will ensure new civilian employees assigned to their unit respond to the Criminalistics Squad as soon as possible and have an ID name badge made.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PHILLIP W. BARNES **c/o LAUFMAN & GERHARDSTEIN** **617 VINE STREET #1409** **CINCINNATI, OH 45202** **PLAINTIFF**	:	**Case No.** **C-1-00-780** **J. Dlott**
vs.	:	**COMPLAINT**
CITY OF CINCINNATI **801 PLUM STREET** **CINCINNATI, OH 45202** **DEFENDANT**	:	(Filed Sep. 18, 2000)

I. PRELIMINARY STATEMENT

1. This is a civil rights action brought by a 19-year veteran of the City of Cincinnati Police Division who was demoted from the rank of sergeant because he is a transsexual who did not conform to typical heterosexual male stereotypes. Officer Phillip W. Barnes was promoted to sergeant in January 1999. Once he became a sergeant, Officer Barnes was singled out and forced to submit to a field training program. No other sergeant has been required to submit to such a program. After daily documentation of every action over five months, Officer Barnes was demoted for lack of "command presence." Officer Barnes was the only sergeant ever demoted in the Cincinnati Police Division. The City demoted Officer Barnes in violation of his right to be free from gender discrimination under Title VII and state law and his right to equal protection under the law as secured by the Fourteenth Amendment to the United States Constitution. Officer

Barnes seeks reinstatement to his rank of sergeant and an award of damages.

II. JURISDICTION

2. Jurisdiction of this court is invoked pursuant to 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1343 (3) and (4).

3. On April 11, 2000, Officer Barnes filed a charge, pursuant to Title VII, of employment discrimination based on gender with the U.S. Equal Employment Opportunity Commission. The EEOC issued a right to sue letter on June 21, 2000. A copy is attached as Exhibit A.

III. PARTIES

4. Plaintiff is a Police Officer with the City of Cincinnati Police Division. He resides in Hamilton County, Ohio. He is a transsexual male. During all relevant times he has been an employee of the City of Cincinnati. He is an employee within the meaning of Title VII and O.R.C. § 4112.01(A)(3).

5. Defendant City of Cincinnati is the employer of plaintiff and is a public employer within the meaning of Title VII and O.R.C. § 4112.01(A)(2).

IV. FACTUAL ALLEGATIONS

6. Phillip Barnes began his career as a police officer in 1981. He has received good evaluations while he has been a police officer.

7. Officer Barnes was a United States Marine, serving in Desert Storm in 1991 and has served in the

Marine reserves for thirteen years. Officer Barnes held the rank of sergeant in the U.S. Marine Corp for over 10 years. In honor of his service in Operation Desert Storm, The City of Cincinnati presented Officer Barnes with a key to the City.

8. He received his Bachelor of Science degree in criminal Justice in 1994 and his Master Degree in Social work in 1996. He went to school at night while he worked as a police officer during the day. In 1998, he received his license to practice social work form [sic] the Ohio Counselor and Social Worker Board.

9. On June 13, 1998, the Cincinnati Civil Service Commission held a promotional test for police sergeant. Plaintiff Officer Barnes placed number 18 out of approximately 150 officers who sat for the test.

10. Officer Barnes successfully completed 80 hours of New Sergeant Training at the Cincinnati Police Academy. He passed the examination and graduated from the training in the Fall of 1998.

11. On January 24, 1999, Officer Barnes was promoted to sergeant in the City of Cincinnati Police Division.

12. Officer Barnes was then transferred from District 5 to District 1 and put on the standard six months probation.

A. SPECIAL FIELD TRAINING PROGRAM

13. Officer Barnes was supervised while on probation much more intensely than any other probationary sergeant. Officer Barnes was the only sergeant to ever be required to submit to a special sergeant "field training" program. The "field training program" required a variety of supervisors to document Officer Barnes' performance on

a daily basis. During that program, he was under observation and evaluation at all times, including video and audio monitoring. No other sergeant has ever been subjected to such intense scrutiny.

14. The field training program was not validated as a supervision tool. It was designed to demoralize Officer Barnes, document all errors, no matter how slight, and force Officer Barnes into making errors so that there would be evidence to support discharge or demotion.

15. During the filed training program, Officer Barnes was not allowed to leave the District alone and at times was prohibited from operating the vehicle, radio, or the computer. His written reports were reviewed for every error, no matter how minute.

16. Officer Barnes was not evaluated as the other new sergeants are evaluated and by not so doing, defendant treated Officer Barnes differently than other probationary sergeants.

B. SEXUAL ORIENTATION AND GENDER DISCRIMINATION

17. It was widely known throughout the Police Division that Officer Barnes' sexual orientation was not heterosexual. He was perceived by members of the division to be bisexual, homosexual, transsexual, or a "cross dresser."

18. During the probationary period, several of Officer Barnes' supervisors and co-workers made comments about his sexual activities, appearance, grooming, and "command presence." These inappropriate statements referred to his pants being too tight, his underwear, his long fingernails, his arched eyebrows, whether he was

wearing painted fingernails, lipstick or face powder, and how he engaged in sexual acts.

19. On one occasion, a commander told Officer Barnes to cut his long nails and long hair and to look more masculine, even though Officer's Barnes' appearance conformed to the division dress code.

20. One of the sergeants that supervised Officer Barnes during field training made particularly offensive comments to plaintiff. These comments were sexually discriminatory and demeaning and were sexually stereotypical for a male police sergeant. This sergeant would ask Officer Barnes if he thought a person was a man or a woman, if he, the sergeant, were a pretty M – F – er. This sergeant also made offensive comments about anal sex. This sergeant would point men out on the street and ask Officer Barnes if he would "do him." This sergeant routinely evaluated Officer Barnes with low performance marks.

21. Another supervisory sergeant asked Officer Barnes, an African-American, if he would "do" a "white guy" or a specific police lieutenant.

22. Officer Barnes was demoted for two reasons. One reason was because he was a transsexual who did not fit the masculine stereotype his supervisors perceived sergeants should have. That is, the way in which Officer Barnes projected the sexual aspect of his personality did not conform to his supervisor's view of appropriate masculine behavior. Defendant's sexual stereotyping of plaintiffs non-masculine personality motivated its decision to place plaintiff in the field training program, to cause him to fail probation, and to demote him.

23. The second reason Officer Barnes was demoted is that defendant's supervisory officers were motivated by prejudice against male police officers who do not have a heterosexual sexual orientation.

24. The sexual comments and actions by supervisory officers were unwelcome and created a hostile work environment, making it impossible for Officer Barnes to do some of his job duties while he was on probation.

25. During all times relevant to the allegations in this case, the City of Cincinnati had a custom or policy of permitting discrimination against transsexuals, non-heterosexual male officers, and against male officers who were not stereotypically male.

C. THE DEMOTION

26. On June 16, 1999, Captain Vincent Demasi recommended that Officer Barnes fail probation as a sergeant due to the following alleged performance failures: Officer Barnes' inattention to grooming standards and his "lack of command presence." The Chief of Police approved the demotion on July 6, 1999.

27. On July 7, 1999, Officer Barnes was demoted to Police Officer. He was then transferred to another District. Officer Barnes is still currently assigned to this position. He has received favorable performance evaluations while in his current post.

28. Officer Barnes was the only sergeant in the Cincinnati Police Division to ever fail probation.

29. Defendants treated Officer Barnes differently than similarly situated heterosexual male officers by placing him

in an intensely scrutinizing field training program designed to find fault with his performance and by demoting him. Defendant's actions were motivated by intentional discrimination due to Officer Barnes being transsexual, his perceived sexual orientation, and by defendant's perception of Officer Barnes not being a stereotypical male.

30. At all times relevant to this action defendant's supervisory officers have acted consistent with and pursuant to city policy, custom and usage with respect to probationary supervision and demotion of Officer Barnes.

31. Officer Barnes is able to do the job as sergeant and seeks reinstatement to the rank of sergeant.

32. Defendant's supervisory officers' actions unreasonably interfered with plaintiff's work performance and created an intimidating, hostile, and offensive work environment.

33. As a direct and proximate result of the defendant's wrongful acts, plaintiff has suffered and will continue to suffer damages from humiliation, embarrassment, mental suffering, emotional injury, serious emotional distress, and demotion in rank and pay.

V. FIRST CAUSE OF ACTION – Title VII

34. Defendant has violated plaintiff's rights under Title VII, 42 U.S.C. §2000e *et seq*.

VI. SECOND CAUSE OF ACTION – § 1983/Equal Protection

35. Defendant has violated rights secured to the plaintiff under the equal protection clause of the 14th Amendment to the United States Constitution.

VII. THIRD CAUSE OF ACTION – Ohio Civil Rights Act § 4112.99

36. Defendant has discriminated against plaintiff in violation of O.R.C. § 4112.99.

VIII. CLAIM FOR RELIEF

WHEREFORE, plaintiff demands that the Court:

A. Award plaintiff compensatory damages in an amount to be shown at trial;

B. Reinstate plaintiff to position of sergeant in the City of Cincinnati Police Division;

C. Award plaintiff other equitable relief;

D. Award plaintiff reasonable attorney's fees, cost and disbursements;

E. Grant to plaintiff such additional relief as the Court deems just and proper.

Respectfully submitted,

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